Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

—v.—

ROBERT L. DOWELL, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN JEWISH CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN JEWISH CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Consent of Parties

Petitioner and respondents have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was established in 1963 at the request of President Kennedy to help assure civil rights to all Americans by affording legal services otherwise unavailable to minorities and the poor pursuing claims for equal treatment under the law. The Lawyers' Committee is a non-profit private corporation that has enlisted the services of thousands of members of the private bar in cases involving voting, education (including school desegregation), employment, housing, municipal services, the administration of justice and law enforcement.

The Lawyers' Committee has a long history of direct support of and participation in cases in the federal courts furthering school desegregation. *E.g.*, *Board of Education* v. *Harris*, 444 U.S. 130 (1979); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Missouri* v. *Jenkins*, ____ U.S. ____, 110 S. Ct. 1651 (1990).

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. In pursuit of those goals, the ACLU has been involved in numerous discrimination cases throughout its seventy-year history. Currently, the ACLU is representing respondents in two school desegregation cases that are pending before this Court on petitions for certiorari. *Freeman* v. *Pitts*, No. 89-1290; *Bd. of Educ. of Topeka* v. *Brown*, No. 89-1681.

The American Jewish Congress is a national organization of American Jews founded in 1918 to protect the civil, religious and economic rights of Jews and all Americans. It has filed briefs in many of the Court's school desegregation cases.

This Court's decision will undoubtedly have significant implications in other school desegregation cases. *Amici* submit that their experience in school desegregation litigation enables them to provide a perspective different from the parties and other *amici* on the issues before this Court.

SUMMARY OF ARGUMENT

This case requires the Court, for the first time, to set forth the standards that district courts should apply in deciding whether to dissolve school desegregation decrees.

It has been more than thirty-five years since this Court in *Brown I* stated unequivocally that the United States Constitution requires public school districts to dismantle dual race school systems. Over that time span, this Court and the other federal courts have confronted circumstances requiring the imposition of court-ordered remedies to assure compliance by school districts with their constitutional obligations. In articulating the standards for determining the appropriateness and terms of such remedies, this Court has consistently applied traditional equitable principles.

An equitable remedy should only be granted to a plaintiff, and imposed on a defendant, if and to the extent necessary to give the plaintiff relief to which he or she is entitled. This Court after *Brown II* thus provided *de jure* segregated school districts numerous opportunities and lengthy periods of time to act "with all deliberate speed" to meet their obligations under the Fourteenth Amendment. Courts decreed the implementation of specific school desegregation plans only after school districts did not and would not implement effective steps to eliminate dual systems, making painfully clear that the constitutional rights of school children could not be vindicated without injunctive relief. The case now before this Court followed precisely this oft-repeated pattern.

This Court has used the term "unitary" to describe a school system in which the objectives to which a school desegregation decree is directed—the elimination of school segregation and its vestiges "root and branch" so that there is assurance the school system will remain free from discrimination—have been fulfilled. As in any case involving equitable remedies, plaintiffs in school desegregation cases are entitled to enforcement of the court's decree until and unless those objectives have been fulfilled. Thus, school boards that seek relief from the compulsion of injunctions bear the substantial burden—borne by any defendant who

seeks dissolution of an injunction—of proving that the injunction is no longer necessary to assure the plaintiffs the relief that is their right.

This Court has not, to date, directly set forth the specific circumstances that would allow proper findings of "unitariness" justifying dissolution of the injunctions that finally forced school districts to comply with their constitutional obligations. Nevertheless, the factors to be applied can be readily derived if the constitutional objectives and equitable principles that have guided this Court's previous examination of school desegregation remedies continue, as they must, to be applied. The application of equitable principles in determining the duration of school desegregation decrees is consistent with concerns of federalism and local control of public education. This Court has always taken those concerns into account when defining the purposes and appropriate scope of school desegregation decrees, and they are not valid bases for now *re*defining the objectives to which the decrees were directed or otherwise departing from traditional equitable principles applicable to the modification or dissolution of decrees.

Because prevailing plaintiffs in school desegregation cases are entitled to an assurance of a unitary school system, mere compliance with the terms of a desegregation decree can hardly be dispositive of whether an injunction should be dissolved or remain in place. This Court has never used the term "unitary" to describe such mere compliance. Rather, a school board seeking dissolution of a desegregation decree must demonstrate that the vestiges of a dual system have been eliminated and that the school district will operate an integrated, nondiscriminatory school system without the compulsion of an injunction. Only then will the school board have fulfilled its constitutional obligation to effectuate a transition from a dual school system to a "unitary" system.

Point II of this brief sets forth a series of factors that should be weighed in a factual inquiry by district courts to determine whether "unitariness" has genuinely been achieved, thereby justifying dissolution of a desegregation

decree. Promulgation by this Court of such factors, as in prior desegregation cases, would guide the lower courts in the use of their equitable powers to achieve the mandates of *Brown I*. These factors are designed to test whether school authorities are currently operating the district on a completely non-racial basis, and whether structural reforms have been instituted to assure that the vestiges of a dual school system will not reappear if the decree is dissolved. In addition, these factors direct the district courts to determine whether, if the injunction is dissolved, the school authorities will institute changes that will have a predictably segregative effect; if such is the case, particularly with regard to pupil assignments, the district courts must be satisfied that the changes are necessary to achieve a compelling governmental interest that cannot be achieved by other means that have less, or no, segregative consequences.

As in any motion to dissolve an injunction, the burden of proof remains on the defendant school district to establish that a desegregation decree is no longer necessary. The showing that school districts must make to meet their burden is a stringent one, and properly so, both in view of the burden that equity traditionally places on defendants seeking dissolution of the plaintiff's remedy, and the history of school desegregation litigation that required injunctions to be entered in the first place. It is, nevertheless, a showing that is quite feasible for a school district that has established a genuine unitary school system, and not merely complied with the specific directives of a court order.

The Oklahoma City desegregation decree was not properly dissolved by the district court because the school board never met its burden of establishing that such dissolution is justified. The district court's reference to "unitary" schools in Oklahoma City in 1977 was, at most, a finding that the injunction was effective in compelling the school district to operate in a nondiscriminatory manner. The district court did not then conduct a proper inquiry as to whether the injunction should be dissolved, and the mere incorrect use of the term "unitary" does not change this result. The district court's 1987 ruling formally dissolving the injunction simi-

larly was not based on a satisfactory showing by the school district with respect to the relevant factors; indeed, as in 1977, the school board and the court largely did not address those factors. Most conspicuously, the school district failed to demonstrate the compelling necessity and unavoidability of reverting to essentially the *same* segregative neighborhood elementary school plan that, prior to the entry of the injunction, was rejected by the district court because it perpetuated the dual school system that the injunction was intended to eliminate.

The correct resolution of this case requires that the district court's improper dissolution of the decree be vacated, thereby reinstating that court's jurisdiction. Because the Circuit Court's judgment accomplishes this result, it should be affirmed, and the district court should exercise its jurisdiction in accordance with the standards set forth by this Court.

ARGUMENT

I

A SCHOOL DESEGREGATION DECREE CAN BE DISSOLVED ONLY WHEN THE OBJECTIVES TO WHICH IT WAS DIRECTED—THE ELIMINATION OF RACIAL DISCRIMINATION "ROOT AND BRANCH" SO THAT A UNITARY SCHOOL SYSTEM IS ASSURED—HAVE BEEN FULFILLED

A. A School Desegregation Decree Is A Permanent Injunction And, As Such, Cannot Be Dissolved Until The Objectives To Which It Was Directed Have Been Fulfilled.

1. School desegregation decrees are governed by traditional principles of equitable relief.

Since *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*), this Court has established that "[i]n fashioning and effectuating [desegregation] decrees, the courts will be

guided by equitable principles." *Id.* at 300. *See, e.g.*, *Milliken* v. *Bradley*, 418 U.S. 717, 737-38 (1974) (*Milliken I*). This has remained "the basic rule which governs to this day." *Milliken* v. *Bradley*, 433 U.S. 267, 279 (1977) (*Milliken II*).

Thus, in *Brown II*, the "segregation cases" were remanded to the district courts for the "exercise of . . . traditional attributes of equity power." *Brown II*, 349 U.S. at 300. This Court instructed the district courts to "retain jurisdiction of these cases" and "to take such proceedings and enter such orders and decrees . . . as are necessary and proper to admit [children] to public schools on a racially nondiscriminatory basis with all deliberate speed." *Id.* at 301.

Consistent with principles of equity, courts did not enter injunctive orders until they determined that school children plaintiffs could not otherwise obtain the relief to which they were entitled. School districts were given ample opportunity and time after *Brown II* to bring themselves into compliance with the Constitution. Consequently, when certain school districts failed to take constructive steps towards the elimination of discrimination, this Court declared in 1968 that "[t]he time for mere 'deliberate speed' has run out" and "[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green* v. *County School Board*, 391 U.S. 430, 438-39 (1968). Consistent with the equitable principles incorporated in *Brown II*, the Court observed that "[t]he obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation." *Id.* at 439.

Three years later, this Court, in upholding equitable desegregation decrees, stated that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to necessities of the particular case," and that "[i]f school authorities fail in their affirmative obligations under [*Brown* and its progeny], judicial authority may be invoked." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). The Court explained that "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16.

It was pursuant to the very invocation of equitable authority mandated by *Green* and *Swann* that the district court for the Western District of Oklahoma entered the desegregation decree (the "Finger Plan") now at issue in this case. *Dowell* v. *Board of Education*, 338 F. Supp. 1256 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972). In 1972, the district court found that the Oklahoma City School Board had "totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own," and noted the "unpardonable recalcitrance of the Defendant Board and the Superintendent of Schools." *Id.* at 1271. Recognizing "that those students who have been and are being subjected to segregated education in the public schools are, regardless of race, having thrust upon them educational infirmities which are constitutionally impermissible," the district court would not "tolerate further delay" in steps necessary to effectuate a transition to a nondiscriminatory school system. *Id.*

2. An equitable injunction, including a school desegregation decree, cannot be dissolved unless the objectives that made entry of the injunction necessary have been fulfilled.

It is a fundamental principle of equitable relief that a permanent injunction will not be dissolved unless the objectives to which the injunction was directed—including elimination of the conditions that made the injunction necessary—have been fulfilled. This principle was articulated by this Court in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), where Justice Cardozo set forth that dissolution of an injunction is inappropriate unless the "dangers" addressed by the decree have "become attenuated to a shadow," *id.* at 119, thereby permitting a release of the defendant from the burdens of compliance without "prejudic[ing] the interests of the classes whom [the] restraint was intended to protect." *Id.* at 117-18. In *Swift*, the Court also ruled that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" allows even a modification—as opposed to

a complete dissolution—of what was decreed. *Id.* at 119. Moreover, Justice Cardozo warned against allowing motions for dissolution or modification to be used as a means to relitigate the validity of, and ultimately reject, the objectives that the injunction was intended to secure "under the guise of readjusting." *Swift*, 286 U.S. at 119.

The standards for dissolution of injunctions, articulated in *Swift*, derive both from fairness and common sense: where an injunction has been entered in response to particular conditions, the injunction should only be dissolved if those conditions have been eliminated. A permanent injunction is designed to prevent a harm; if the conditions or institutions giving rise to the harm remain, then simply dissolving the injunction and ending court jurisdiction serves no equitable purpose. An injunction should only be dissolved if it is no longer necessary to secure relief to which the plaintiff is entitled.

This Court has never deviated, in any context, from the equitable principles, articulated in *Swift*, that an injunction cannot be dissolved unless the objectives to which it was directed have been fulfilled, nor modified except to further those objectives.[1] This Court and the lower courts have, in certain cases, required less than a showing of "grievous wrong evoked by new and unforeseen conditions" to allow modifications that *further* equitable objectives; however, the fundamental principle underlying *Swift*—that the objectives to which the injunction was directed must be pursued—has not been limited. Thus, in *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968), though this Court granted the government's motion to modify an injunction to impose *more* onerous limitations on the enjoined party, the Court also expressly observed that, consistent with *Swift*, a

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1 In modern cases where a party seeks to dissolve or modify a permanent injunction, relief has normally been sought under Rule 60(b) of the Federal Rules of Civil Procedure, which incorporates into the Federal Rules the equitable principles, articulated in *Swift* and its progeny, governing dissolution and modification of injunctions. *See generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2863; 7 Moore, *Moore's Federal Practice* ¶ 60.26[4].

decree "may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *Id.*, 391 U.S. at 248 (emphasis in original). Rather than reject *Swift*, the Court in *United Shoe* noted that "[t]he present case is the obverse of the situation in *Swift* if the Government's allegations [that a more stringent decree is needed to effectuate the purposes of the order] are proved." *Id.* at 249.[2] Nothing in *United Shoe* undermines the application of *Swift* in circumstances where "the defendants [seek] relief not to achieve the purposes of the provisions of the decree, but to escape their impact." *Id.*

Similarly, in *System Federation No. 91 Railway Employees' Dep't* v. *Wright*, 364 U.S. 642 (1961), though this Court allowed a decree to be modified, it did not limit the application of the fundamental principles articulated in *Swift* where the objectives to which the injunction was directed have not been fulfilled. Rather, in *Wright*, the modification of a decree barring "union shop" labor agreements on certain rail lines was found appropriate because the federal Railway Labor Act had been amended, subsequent to the granting of injunctive relief, to make lawful the very activity—"union shop" agreements between railroads and labor unions—prohibited by the decree. Clearly, the circumstance warranting imposition of the injunction—the illegality of "union shop" agreements under the Railway Labor Act—had been eliminated. In *Wright*, the Court attributed the very power of a district court to modify a decree to "the fact that an injunction often requires continuing supervision by the issuing court" to achieve the objectives for which the injunction was entered "on behalf of the party who obtained that equitable relief." *Id.* at 647.[3]

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2 *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2961, at 602 (1973) (*United Shoe* "has said that the thrust of the *Swift* test is based not so much on the harm being suffered by the enjoined party but on the continuing need for the injunction").

3 The lower federal courts have not deviated from the principles that absent a showing that a decree is no longer necessary, or that modification

(*footnote continued on next page*)

Consistent with the equitable principles for dissolution of injunctions, this Court has recognized that district court

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(*footnote continued from previous page*)

will further the objectives to which the decree was directed, an injunction will not be dissolved or modified. In certain cases, application of these principles has resulted in denial of motions for dissolution or modification. *See, e.g.*, *Mayberry* v. *Maroney*, 558 F.2d 1159 (3d Cir. 1977) (denying State of Pennsylvania's motion for modification of a previous consent order enjoining the state from confining inmates in a basement facility at a state penitentiary); *Ridley* v. *Phillips Petroleum Co.*, 427 F.2d 19 (10th Cir. 1970) (denying oil company's motion to dissolve an injunction that restrained it from disconnecting a gas line); *Humble Oil & Refining Co.* v. *American Oil Co.*, 405 F.2d 803 (8th Cir.) (Blackmun, J.), *cert. denied*, 395 U.S. 905 (1969) (denying motion to modify an injunction restraining oil companies from using certain trademarks and names).

In other cases, where motions to dissolve or modify have been granted, courts have similarly not deviated from the principle that dissolution or modification in contravention of the purposes of the injunction is not appropriate. *See, e.g.*, *United States* v. *City of Chicago*, 663 F.2d 1354, 1360 (7th Cir. 1981) ("[t]he standard for modifications and injunctions that emerges from *Swift* and *United Shoe* . . . incorporates consideration of whether there remains any need to continue the injunction, that is, whether 'the purposes of the litigation as incorporated in the decree' have been achieved"); *New York State Ass'n for Retarded Children* v. *Carey*, 706 F.2d 956, 970 (2d Cir.), *cert. denied*, 469 U.S. 915 (1983) (Friendly, J.) (granting modification of injunction addressing conditions at state community care facilities, where modification offered an improved means of achieving the "desired objectives" to which the injunction was directed); *Heath* v. *De Courcy*, 888 F.2d 1105, 1108 (6th Cir. 1989) (allowing modification of consent decree designed to limit overcrowding in prisons where modification did "not increase the risk to inmates" that was the subject of the decree); *Hodge* v. *Dep't of Housing & Urban Dev.*, 862 F.2d 859, 861 (11th Cir. 1989) (dissolution of injunction, mandating compliance with certain notice and hearing requirements for proceedings relating to payments by tenants for damaged property, permissible if new statutes mandate compliance with the terms of the decree); *King-Seeley Thermos Co.* v. *Aladdin Industries, Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) (modification of an injunction permissible where "the decree is not properly adapted to accomplishing its purposes"; power to modify should be exercised sparingly). Cases such as these have addressed "the preferable means for achieving the ends to which the decree was intended," not "whether the proposed modification would or would not derogate the primary objective of the decree." *Benjamin* v. *Malcolm*, 564 F. Supp. 668, 686 (S.D.N.Y. 1983). *See also Ruiz* v. *Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (courts have not deviated from "the *Swift* principles that a modification should not vitiate the decree").

jurisdiction in school desegregation cases will end "[a]t some point," but only when "school authorities . . . have achieved full compliance with this Court's decision in *Brown I*." *Swann*, 402 U.S. at 31. In the past, as remains true today, there is no basis for a conclusion that school desegregation decrees should be dissolved before the objectives to which they are directed have been fulfilled.[4] Nor should the objectives defined in *Brown* and its progeny now be re-evaluated under the guise of dissolution or modification. Rather, upon a motion to dissolve or modify, the proper exercise of equitable power requires a determination whether those objectives have been achieved.

B. The Objectives To Which A School Desegregation Decree Is Directed Are The Elimination Of Racial Discrimination And Its Vestiges From The School System "Root And Branch" So That A "Unitary" School System Is Assured.

1. A school system becomes "unitary" when the objectives to which a desegregation decree is directed have been achieved.

School desegregation decrees have been entered where school districts failed to fulfill their affirmative duty, under

4 In *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976), this Court did order that a desegregation decree be modified, but only to eliminate provisions that were determined, based on the intervening decision of this Court in *Swann*, to be outside the scope of the district court's power to remedy *de jure* segregation. *Spangler* thus did not address the standards for modifying or dissolving valid desegregation decrees. This Court, however, did set forth that the "well established rules governing modification of even a final decree entered by a court of equity" apply to desegregation injunctions. *Id.* at 437 (criticizing judge on Court of Appeals for "overlook[ing]" those "well established rules"). Citing *Swift*, *Wright* and *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), this Court reiterated that "[t]he source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Spangler*, 427 U.S. at 437 (*quoting Wright*, 364 U.S. at 647). It would be as inequitable as it would be illogical to dissolve a desegregation decree before eradication of the conditions making necessary the "continuing supervision by the issuing court."

the Fourteenth Amendment, "to effectuate the transition to a racially nondiscriminatory system." *Brown II*, 349 U.S. at 301. This Court has used the term "unitary" to describe a school system that has completed effectively the obligatory transition from a previously *de jure* segregated (or "dual") school system. Under the Fourteenth Amendment, "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Green*, 391 U.S. at 436.

The term "unitary" in and of itself derives legal significance in school desegregation cases from its use as a jurisprudential "term of art." As such, it is plain that a school system only becomes "unitary in the sense required by [this Court's] decisions" when school authorities "have achieved full compliance with this Court's decision in *Brown I*." *Swann*, 402 U.S. at 31. The Court has thus explained that:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. . . . That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."
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> — *Swann*, 402 U.S. at 15.

See also Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449, 458 (1979).

The reason that school districts are required to eliminate racial discrimination "root and branch" is that the objective is not creation of desegregated systems that are ephemeral or that exist only by reason of an injunction's compulsion. Rather, the objective is a school system whose unitary status is assured:

> As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer accept-

able remedies, a district court has broad power to fashion a remedy that *will assure a unitary school system.*

— *Swann*, 402 U.S. at 16 (emphasis added).

Accordingly, the objective to which desegregation decrees are directed—and the fulfillment of which would justify dissolution of a decree—is nothing less than "a unitary system in which racial discrimination would be eliminated root and branch," *id.* at 15, and, therefore, whose unitary status is assured in the absence of a decree.

This Court has not wavered in its recognition of the constitutional obligation of school boards to eliminate discrimination and its vestiges "root and branch." *See, e.g., Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 200 (1973); *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 537 (1979) (*Dayton II*). The school board's "continuing 'affirmative duty to disestablish the dual school system' is . . . beyond question." *Columbus*, 443 U.S. at 460 (1979) (citation omitted).

It is equally clear that the school district's affirmative duty to eliminate racial discrimination root and branch and assure a unitary school system is not a modest one, and that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation." *Swann*, 402 U.S. at 26. It is now beyond dispute that "discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination." *Milliken II*, 433 U.S. at 283. *See also Keyes*, 413 U.S. at 203. For this reason, "[f]ederal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system." *Milliken II*, 433 U.S. at 283.

Thus, nondiscriminatory reassignment of students alone has never been treated as defining a unitary school system. *Green* recognized that "existing policy and practice with regard to faculty, staff, transportation, extra-curricular activities and facilities were among the most important indicia of a segregated system." *See Swann*, 402 U.S. at 18 (*citing Green*, 391 U.S. at 435). *See also United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969). Where, for example, it has not been established that procedures for hiring and promoting teachers and administrators in a school district have been rid of the vestiges of racial discrimination, "it may well be that [the school board has] not yet totally achieved the unitary system contemplated by . . . *Swann*." *Spangler*, 427 U.S. at 436. In *Milliken II*, this Court upheld a school desegregation decree that addressed remedial programs, testing, in-service teacher training and counseling, explaining that the decree "was aptly tailored to remedy the consequences of the constitutional violation" because "[c]hildren who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation." *Id.* at 287.

Indeed, segregated pupil assignments are often themselves only a reflection of systemic vestiges of a long-standing regime of *de jure* segregation, such as "the community and administration attitudes toward the school." *Keyes*, 413 U.S. at 196. At the same time, school desegregation can itself breed segregation in other areas, such as housing. As the Court unanimously recognized in *Swann*:

> Over the long run, the consequences of the choices [made by the school board] will be far reaching. . . . The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. . . . In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. . . . [A discriminatory school location policy] does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races.
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> — *Swann*, 402 U.S. at 20-21.

The term "unitary" thus encompasses a far-reaching constitutional obligation of the school board. If students have a "constitutional right . . . to attend a unitary school system," *Milliken I*, 418 U.S. at 746, then a definition of "unitary" that requires less than the fulfillment of the school district's affirmative duties can only undermine the very constitutional rights this Court has sought to protect in mandating school desegregation plans.

2. Mere compliance for a period of time with the particular terms of a desegregation decree does not, of itself, make a school system unitary; rather, the conditions in and affecting the school system must be such that there is assurance the school system will be unitary in the absence of a court injunction.

Consistent with the affirmative duty to remedy the constitutional violation of *de jure* segregation by eradicating discrimination and its vestiges "root and branch," mere compliance for a period of time with the terms of a school desegregation decree has never been equated by this Court with the creation of a unitary school system. School desegregation decrees were not meant to limit the affirmative duties of school boards; rather, the decrees were meant to *assure* that those duties would be fulfilled. *Swann*, 402 U.S. at 16. In this case, the district court implemented a desegregation decree as "another *step* in the struggle to implement the constitutional imperative for a unitary school system in the Oklahoma City School District." *Dowell*, 338 F. Supp. at 1258 (emphasis added).

The objectives to which a desegregation decree is directed, then, are only fulfilled when there is assurance that the school district will be unitary in the absence of a court injunction. The district courts have had "not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*" *Green*, 391 U.S. at 438 n.4 (emphasis added) (*quoting Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)). For example, "[i]n

devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that *future* school construction and abandonment are not used and *do not serve to perpetuate or re-establish the dual system.*" *Swann*, 402 U.S. at 21 (emphasis added). *See also Columbus*, 443 U.S. at 459-61; *Dayton II*, 443 U.S. at 258.

Moreover, although desegregation decrees serve remedial functions, this "does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system." *Milliken II*, 433 U.S. at 290 (emphasis in original). Even after a desegregation decree has been entered, the school board remains "under a continuous constitutional obligation to disestablish its dual system," and "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus*, 443 U.S. at 459. *See also Missouri* v. *Jenkins*, ____ U.S. ____, 110 S. Ct. 1651, 1666 (1990).[5]

School desegregation injunctions, like other equitable decrees, "require[ ] continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Spangler*, 427 U.S. at 437. *See* p. 12 n.4, *supra*. This Court has always held that "whatever plan is adopted will require evaluation in practice, and the court should

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5 It is thus inappropriate to distinguish school desegregation decrees as being "remedial" rather than "prohibitive." *Compare Spangler* v. *Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 (9th Cir. 1979) (Kennedy, J., concurring). The "remedy" for long-term *de jure* segregation, as this Court has recognized, includes prospective application of the decree—so that a dual school system will not re-emerge—until discrimination and its vestiges have been eradicated "root and branch." *See Milliken II*, 433 U.S. at 290 (components of decree which operate prospectively "are plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained"). This Court has recognized that school desegregation decrees can more appropriately be distinguished from "punitive" relief. *See Milliken II*, 433 U.S. at 288 ("[t]he order does not punish anyone").

retain jurisdiction until it is clear that state-imposed segregation has been completely removed." *Green*, 391 U.S. at 439. *See also Brown II*, 349 U.S. at 294; *Swann*, 402 U.S. at 21.

Compliance with the terms of a desegregation decree for a period of time, with nothing more, does not assure that a dual system will not re-emerge in the absence of the decree. *See, e.g., Riddick* v. *School Board*, 784 F.2d 521, 533 (4th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986) ("the mere implementation of a desegregation plan does not convert a dual system into a unitary one"). Such compliance of itself does not justify dissolution of the decree and the termination of court jurisdiction.

C. The Application Of Equitable Principles To The Dissolution Or Modification Of Desegregation Decrees Is Not Limited By Principles Of Federalism And The Value Of Local School Board Autonomy, But Instead Takes Those Factors Into Account.

The exercise of equitable powers by federal courts in school desegregation cases has always taken account of principles of federalism, and, therefore, concern for local control of public education has been a premise for the use of equitable relief. In *Brown II*, this Court recognized that "[s]chool authorities have the primary responsibility for elucidating, assessing, and solving" the varied local school problems encountered in the full implementation of the constitutional principles articulated in *Brown I*. *See Brown II*, 349 U.S. at 299. It was for this very reason that the district courts were instructed to exercise their equitable powers: "[t]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.* at 300.

Since *Brown II*, this Court has continually recognized, and never ignored, that "local autonomy has long been thought essential to both the maintenance of community concern and support for public schools and to quality of the education process." *Milliken I*, 418 U.S. at 741. It has only been with express recognition of the value of local autonomy in public

education that this Court has upheld the imposition of equitable desegregation decrees. As this Court has explained, "[i]t is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). *See also Milliken I*, 418 U.S. at 744.

Thus, in *Swann*, this Court could affirm the imposition by a district court of racial balances, altered attendance zones and a student transportation plan while recognizing that "[s]chool authorities are traditionally charged with broad power to formulate and implement education policy." *Swann*, 402 U.S. at 16.

Similarly, in *Milliken II*, this Court could uphold broad remedies relating to remedial programs, testing, teacher training and counseling while reiterating that "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken II*, 433 U.S. at 280-81. Aware of the "inherent limitation upon federal judicial authority," this Court expressly found that the four remedies at issue in *Milliken II*, "*although normally left to the discretion of the elected school board and professional educators*, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a non-discriminatory manner in a school system free from pervasive *de jure* racial segregation." *Id.* at 282 (emphasis added). *See also id.* at 291 ("principles of federalism [are not] abrogated by the decree").

More recently, in *Missouri* v. *Jenkins*, ____ U.S. ____, 110 S. Ct. 1651 (1990), this Court was able to affirm the power of federal courts to require a school district to levy taxes for the funding of a school desegregation plan, while also reaffirming the principle that "local authorities have the 'primary responsibility for elucidating, assessing, and solving'

the problems of desegregation." *Id.*, 110 S. Ct. at 1664 (*quoting Brown II*, 349 U.S. at 299).

Given that the remedial scope of school desegregation decrees has already been defined to account for the value in our constitutional scheme of local control over public education, an interest in such local control cannot now appropriately be a basis for deviating from basic equitable principles governing when those decrees can be dissolved or modified. Such a deviation would undermine—and effectively *re*define—the objectives of desegregation decrees by allowing dissolution before those objectives, defined with full regard for local autonomy, have been fulfilled. The appropriate inquiry upon a motion for dissolution is to determine whether the objectives to which the desegregation decree is directed have, indeed, been achieved.

D. The Burden Is On The School Board To Establish That The School System Has Become "Unitary" In The Sense Required By The Fourteenth Amendment, Thereby Justifying Dissolution Of The Injunction.

The party subject to an equitable decree always bears the burden of establishing that it should be relieved of the obligation to comply with the decree. *See, e.g., Swift*, 286 U.S. at 119; *Ruiz* v. *Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956, 969-70 (2d Cir. 1983); *Humble Oil & Refining Co.* v. *American Oil Co.*, 405 F.2d 803, 813 (8th Cir.) (Blackmun, J.), *cert. denied*, 395 U.S. 905 (1969).

There is no basis for shifting the burden away from the enjoined party on a motion to dissolve or modify a school desegregation decree. Indeed, in the school desegregation context, the burden is always on the school board to justify actions that appear inconsistent with the affirmative duty to desegregate "to the fullest extent possible" until a "unitary" school system has been achieved.

The affirmative duties of the school board under *Brown* thus place "a heavy burden upon the board to explain its preference for" steps that are "apparently less effective" in

achieving desegregation than other "more promising courses of action." *Green*, 391 U.S. at 439. This burden does not end, and is in fact appropriately triggered, where a school board seeks to abandon a decree that mandates desegregated schools. The district court must evaluate dissolution of the decree—or particular proposals for modification—"in light of any alternatives which may be shown as feasible and more promising in their effectiveness" towards desegregation. *See Green*, 391 U.S. at 439. As this Court has recognized, "the availability to the board of other more promising courses of action may indicate a lack of good faith." *Id.*[6]

Just as a school board can rebut a *prima facie* case of discriminatory intent "only by showing that its past segregative acts did not create or contribute to the current segregated condition" of the schools, *Keyes*, 413 U.S. at 211, so too a

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6 In a school district with a history of *de jure* segregation, the school board's evidentiary burden is defined by the constitutional imperative that "[t]he measure of any desegregation plan is its effectiveness." *Davis* v. *Bd. of School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971). Where a school district seeks to implement, or deviate from, a desegregation plan, this Court has therefore "focused upon the effect—not the purpose or motivation—of the school board's action in determining whether it is a permissible method of dismantling a dual system." *Wright* v. *Council of Emporia*, 407 U.S. 451, 462 (1972). As Justice Stewart explained for the Court in response to arguments by school board officials that their purpose in deviating from a court-approved desegregation plan was nondiscriminatory, an "inquiry into the 'dominant' motivation of school authorities *is as irrelevant as it is fruitless*." *Id.*, 407 U.S. at 462 (citations omitted) (emphasis added).

Indeed, as this Court has stressed, even a purportedly "racially neutral" assignment plan "may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation." *Swann*, 413 U.S. at 212. *See also Keyes*, 413 U.S. at 213 ("neighborhood school policy is not to be determinative 'simply because it appears neutral' "). Even if a finding of "intent" were necessary, "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose" and stand as "one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." *Columbus*, 443 U.S. at 464-65. *See also Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 421 (1977) (*Dayton I*) (Stevens, J., concurring).

school board subject to a court desegregation order retains an affirmative duty to demonstrate that its actions do not allow the vestiges of prior discrimination to have continued effect. The school board is obliged "not to take any action that would impede the process of disestablishing the dual system and its effects." *Dayton II*, 443 U.S. at 538. Although "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention[,] . . . a connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist." *Keyes*, 413 U.S. at 211.

The task, then, is to set forth the factors that a district court should consider in determining whether a school board has satisfied its burden of establishing that a desegregation decree should be dissolved.

II

BEFORE DISSOLVING A DESEGREGATION DECREE, A DISTRICT COURT MUST MAKE A FACTUAL INQUIRY WHICH ESTABLISHES THAT THE VESTIGES OF THE DUAL SYSTEM HAVE BEEN ELIMINATED "ROOT AND BRANCH," AND THAT THE SEGREGATIVE EFFECTS OF THE CONSTITUTIONAL VIOLATION WILL NOT REAPPEAR AFTER THE DECREE IS DISSOLVED

As set forth in Point I, *supra*, a school desegregation decree cannot be dissolved until the school board demonstrates the fulfillment of the objectives to which that decree was directed, namely, the elimination of *de jure* segregation and its vestiges "root and branch" so that the continuation of a school system free from discrimination is assured. This case involves an issue that this Court has not yet addressed—what are the factors a district court should apply to determine whether the dissolution of a desegregation decree is justified? By indicating clearly to the district courts the

nature of the inquiry they should undertake in deciding whether to dissolve desegregation decrees, this Court will continue to perform the role that it has played in prior desegregation litigation when it established the standards to be applied by the district courts in determining the existence of a district-wide violation and the appropriate scope of a remedial decree.

A desegregation decree, like other permanent injunctions, cannot be dissolved until the purposes to which it is directed have been achieved. In applying that standard, a district court must direct its inquiry in two directions—*backward*, to determine whether the school authorities have fulfilled their obligation to operate a fully integrated school system that has eliminated the vestiges of the dual system, and *forward*, to determine whether dual schools are likely to emerge if the injunction is dissolved. Only if these conditions are met can the district court conclude that the injunctive remedy has accomplished its purposes and that the injunction can therefore be dissolved. Only then will the school district have completed the transition to a "unitary system."

In determining whether the school authorities have met the burden of demonstrating that the purposes of the injunction have been achieved, the district court should conduct a factual inquiry addressed, at a minimum, to the following issues:

1. *Is the school system operating on a non-racial basis*? Prior decisions of this Court have outlined the scope of this aspect of a district court's inquiry, which extends beyond the question of whether children, under the decree, are assigned to schools in a nondiscriminatory manner. *See, e.g., Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 18; *Keyes*, 413 U.S. at 196; *Spangler*, 427 U.S. at 436; *Milliken II*, 433 U.S. at 283. *See generally* Point I, *supra*, at 12-16. School districts must provide affirmative answers, supported by factual data, to the following questions:

   a. Has the district's pupil assignment plan achieved the objective of racially integrated schools?

b. Has the assignment of pupils to classes, programs, and activities within individual schools been done on a basis that does not perpetuate the effects of the racially segregated school system?

c. Has racial integration of principals, teachers and staff been achieved?

d. Has the district eliminated inequalities among its schools in physical plant, equipment, curriculum and extracurricular activities?

e. Are funds being allocated to schools on a fully nondiscriminatory basis?

f. Have efforts been made to remedy the educational deficiencies that may have resulted from the dual system?

g. Has racial integration been achieved in the administrative structure of the school system?

2. *In the absence of an injunction, is the school system likely to continue to operate on a non-racial basis*? The purpose of this inquiry should be not simply to establish the subjective good faith of the school authorities, but rather to determine whether structural changes have been adopted in the governance and operation of the system to assure that integration will predictably survive the dissolution of the decree. *See*, *e.g.*, *Green*, 391 U.S. at 438 and n.4; *Swann*, 402 U.S. at 16, 21; *Keyes*, 413 U.S. at 196-211; *Milliken II*, 433 U.S. at 290; *Columbus*, 443 U.S. at 459; *Riddick* v. *School Board*, 784 F.2d at 533; *United States* v. *Lawrence County School Dist.*, 799 F.2d 1031, 1044 (5th Cir. 1986), *reh'g denied*, 808 F.2d 1063 (5th Cir. 1987). *See generally* Point I, *supra*, at 16-18. The district court's inquiry should address the following questions:

a. Have electoral or appointive procedures been established to assure that racial minorities have the opportunity for involvement in the governing process of the school district?

b. Have policies been adopted to assure that decisions with regard to school construction and location are designed to achieve maximum racial integration?

c. Have personnel policies been adopted to assure racial integration in the assignment of teachers and the appointment of principals?

d. Are members of minority groups serving in policy-making administrative positions within the school system?

e. If segregated residential housing patterns resulted from the operation of the dual school system, have these patterns remained in place, thereby diminishing the likelihood that an integrated school system will survive the dissolution of the decree?

3. *Is it foreseeable that in the absence of an injunction the school district may take actions, particularly with regard to pupil assignment, that would have a segregative effect*? The district court should determine whether such actions are foreseeable and, if so, the school district will have a heavy burden of proving that those actions would be taken for compelling and non-segregative purposes, and that such purposes could not be accomplished in a manner that would have no, or less, segregative effects. *See*, *e.g.*, *Green*, 391 U.S. at 430; *Swann*, 402 U.S. at 26; *Wright*, 407 U.S. at 462; *Keyes*, 413 U.S. at 211; *Dayton II*, 443 U.S. at 538. *See generally* Point I, *supra*, at 20-22. Thus, where a change in the pupil assignment system is foreseeable, the decree should not be dissolved unless the district court is satisfied that:

a. The changes will not have the predictable effect of creating schools that are identifiably single-race schools.

b. The changes in the pupil assignment plan are not based on residential housing patterns that are themselves the outgrowth of the prior dual system.

c. The school district has selected the least segregative means of adapting its pupil assignment system to changed circumstances.

d. Changes in the pupil assignment system will not impede the efforts of the school district to maintain a racially integrated school system.

In applying these standards, the district courts should, of course, be sensitive to the concerns that have been present in this Court's prior desegregation rulings. These include the history and special circumstances of the district, such as the duration of time during which the district court operated a dual system, the district's history of resistance to change, the duration of the decree, and the public's acceptance of the permanence of a fully integrated school system. *See, e.g., Swann*, 402 U.S. at 20-21; *Keyes*, 413 U.S. at 211; *Milliken II*, 433 U.S. at 287.

Such concerns have also included the desirability of accommodating changed circumstances in the district through narrow modifications of an existing decree, rather than through the process of new desegregation litigation. Premature dissolution of a desegregation decree inevitably involves citizens, government officials and the courts in litigation far more extensive and complex than is involved in the consideration of more narrowly-defined modifications of existing decrees.

As always, the burden remains on the school district to demonstrate that the goals of the order have been achieved and that the injunction is no longer necessary to preserve those goals. The district courts should dissolve injunctions only where school districts have made such a showing.

III

BECAUSE THE DISTRICT COURT APPLIED AN ERRONEOUS CONSTITUTIONAL STANDARD IN DECLARING THE SCHOOL DISTRICT "UNITARY" AND DISSOLVING THE DESEGREGATION DECREE, ITS DECISION WAS PROPERLY REVERSED AND THE JUDGMENT OF THE TENTH CIRCUIT SHOULD BE AFFIRMED

A. The District Court Never Properly Determined That The Desegregation Decree Could Be Dissolved.

The type of inquiry necessary to justify dissolution of a desegregation decree was never conducted by the district court in this case.

No such inquiry was made in 1977, when, after implementing the desegregation decree for less than six full years, the Oklahoma City school board asked the district court to terminate its jurisdiction. Although Oklahoma City schools had been segregated by law for well over half a century, and although the school board had been recalcitrant just six years earlier in refusing to adopt on its own an effective desegregation plan, the school board in 1977 claimed that it had already "eliminated all vestiges of state-imposed racial discrimination in its school system" and that it was "operating a unitary school system." *See Dowell* v. *Board of Education*, 606 F. Supp. 1548, 1551 (W.D. Okla. 1985).

In response to the school board's motion, the district court held a hearing concerning "the state of desegregation in the Oklahoma City public schools." *Id.* The district court found that the school board had implemented the desegregation decree since 1972, and did not "foresee that the termination of its jurisdiction [would] result in the dismantlement of the Plan" the decree had mandated. *Id.* Based on these findings, the district court terminated its jurisdiction and dissolved a "biracial committee" that had been established to assist the court in actively ensuring compliance with the decree.

The district court, however, did not directly address whether the decree itself could or would be dissolved. Nor were the district court's findings directed to that issue: as the

Tenth Circuit later observed, the district court did not consider, for example, whether there existed any assurance that unitary schools would be *maintained* in the absence of the court's injunction. *See Dowell* v. *Board of Education*, 795 F.2d 1516, 1520 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986). The district court's reference in its 1977 order to a "unitary system" in Oklahoma City described little more than compliance by the school board for a period of time with the terms of the desegregation decree. Such compliance was simply insufficient to justify dissolution of the desegregation decree—even where the school board had become "sensitized to the constitutional implications of its conduct" and had "a new awareness of its responsibility to citizens of all races." *See Dowell*, 606 F. Supp. at 1551. The district court's reference certainly did not purport to constitute a finding that the "unitary system" was one "in which racial discrimination [had been] eliminated root and branch," *Green* at 438, nor was there a record before the court that could have supported such a finding.

The district court again did not require the school board to make a sufficient showing when it formally dissolved the desegregation decree in 1987. Even on remand from the Circuit Court, and while seeking to determine whether the dangers prevented by the injunction had "become attenuated to a shadow," *see Dowell*, 677 F. Supp. 1503, 1520 (W.D. Okla. 1987), the district court did not require a showing that racial discrimination and its vestiges had been sufficiently eradicated to assure a unitary system in Oklahoma City in the absence of injunctive relief—the very purpose articulated by the court when it imposed the desegregation decree in 1972. *See Dowell*, 338 F. Supp. at 1272 (recognizing a "continuing duty . . . to retain jurisdiction over the case until it is clear that the constitutional requirements have been achieved.").

More specifically, the district court in 1987 did not sufficiently examine the appropriateness of dissolving its decree when it would result in a return to essentially the same neighborhood elementary school plan that had been rejected in 1972 because it perpetuated the dual school system that the injunction, then entered by the court, was intended to elimi-

nate. The school district was not even required to prove that its purported educational reasons for wanting to return to the segregative neighborhood school plan could not be accomplished in any other way that would not have such segregative effects. The district court approved reversion to the neighborhood school plan, even though it would result in segregated schools, because the *defendant* school board claimed that it would serve purposes that the board deemed important. And the court gave short shrift to the issue that is central: the *plaintiffs*' resulting loss of the relief to which they are entitled—a unitary school system in which racial discrimination has been eliminated root and branch.

B. The Tenth Circuit Properly Reversed The Dissolution Of The Desegregation Decree By The District Court, And The Jurisdiction Of The District Court In This Case Should Be Retained.

Because the district court did not require the school board to satisfy its heavy burden of establishing that the constitutional imperatives of the desegregation decree had been fulfilled—thereby assuring a unitary school district even in the absence of a decree—the judgment of the Tenth Circuit, invalidating the dissolution of the decree, must be affirmed.

The district court's use of the term "unitary" in 1977, though never appealed by the parties, is not a talisman allowing a different result: the term "unitary," absent the necessary underlying factual findings, can have no legal significance justifying dissolution of a desegregation decree. If "[s]ubstance, not semantics, must govern" in school desegregation cases, *Swann*, 402 U.S. at 31, then only when the constitutional imperatives of the Fourteenth Amendment have been fulfilled can the Oklahoma City school system be deemed "unitary" in the constitutional sense. While dissolution of the Oklahoma City injunction will be appropriate at some time, that time will not have arrived until the school board has made an appropriate showing. For now, the district court must retain jurisdiction to take such action as may be appropriate in accordance with the constitutional stan-

dards set forth in this proceeding and the prior decisions of this Court.

The constitutional principles articulated by this Court in *Brown* and its progeny should not now be undermined by premature dissolution of the very desegregation decrees that have been necessary to carry out the mandates of the Fourteenth Amendment.

CONCLUSION

The judgment of the Tenth Circuit Court of Appeals should be affirmed.

July 25, 1990

Respectfully submitted,

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